U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 18 October 2006

CASE NO.: 2005-BLA-05044

In the Matter of

M.L. o/b/o the estate of R.L.,
Claimant,

v.

DIAMOND MAY MINING COMPANY,
Employer,

and

PROGRESS ENERGY COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-interest.

Appearances:

MONICA RICE SMITH, Esq.,
For Claimant

LOIS A. KITTS, Esq.
For Employer/Carrier

Before:

JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a living miner's claim for benefits under the Black Lung Act, 30 U.S.C. §§901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that

Title.[1] Because the Miner died before adjudication of the claim was completed, his estate has been substituted as party on his behalf.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

On October 1, 2004, this case was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. Subsequently, the case was assigned to me. I held a hearing on May 9, 2006, in Hazard, Kentucky, at which time the parties had full opportunity to present evidence and argument.[2] The following decision is based upon a thorough review of the evidentiary record, the arguments of the parties and an analysis of the applicable law.

I. ISSUES

(1) Whether the claim was timely filed;

(2) Whether Employer Diamond May Mining Company is the properly named responsible operator pursuant to 20 C.F.R. §§725.491-725.494.

(3) The length of the Miner's coal mine employment;

(4) Whether the Miner had pneumoconiosis pursuant to 20 C.F.R. §718.202;

(5) Whether the Miner's alleged pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203;

(6) Whether the Miner was totally disabled pursuant to 20 C.F.R. §718.204(b); and

(7) Whether the Miner's alleged pneumoconiosis substantially contributed to his total disability pursuant to 20 C.F.R. §718.204(c).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.R. Parts 718, 722, 725, and 726 (2002). They are applicable to all claims pending, on, or filed after that date. See 20 C.F.R. §718.101(b)(2001); 20 C.F.R. §725.2(c)(2001). Since Claimant's current claim was filed on March 26, 2001, the revised regulations apply to his claim. The United States Court of Appeals for the District of Columbia has upheld the validity of the revised regulations. See National Mining Assoc. v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002).

[2] In this Decision and Order, "DX-#" refers to Director's Exhibits; "CX-#" refers to Claimant's Exhibits; "EX-#" refers to Employer's Exhibits and "Tr. at -" refers to the Hearing Transcript of May 9, 2006.

A. Procedural History

On March, 26, 2001, R.L. ("the Miner") filed a living miner's claim for federal black lung benefits with the United States Department of Labor, Director of Office of Workers' Compensation Programs ("OWCP" or "Director"). DX-2. By Proposed Decision and Order issued December 16, 2002, the Director denied an award of benefits. DX-39. The Director found that the Miner had established eighteen (18) years of coal mine employment and named Diamond May Mining Company ("Employer") as the responsible operator. Id. The Director found that the Miner had established that he was totally disabled under the Act, but denied the claim, finding that the Miner had failed to establish that he had pneumoconiosis arising out of coal mine employment. Id. On January 2, 2003, the Miner requested a formal hearing before OALJ in order to contest the Director's denial. DX-40. On October 8, 2003, a formal hearing was held before Administrative Law Judge ("ALJ") Joseph E. Kane. DX-47. On November 8, 2003, the Miner passed away. DX-48-3. By Order of Remand issued May 24, 2004, ALJ Kane remanded the case to the Director for further development of the record. Id. By correspondence dated July 20, 2004, counsel for the Miner notified OWCP that the estate of the Miner ("Claimant") would like to continue to pursue the Miner's claim. DX-48-5.

On October 1, 2004, the Claimant's claim was referred back to OALJ for a formal hearing. DX-49. Thereafter, the case was reassigned to me. By Notice issued January 30, 2006, I scheduled a formal hearing for May 9, 2006, in Hazard, Kentucky. At the hearing on that date, evidence was received into the record and live testimony was taken of the Miner's brother. Following the hearing, Claimant submitted written closing argument[3] on July 11, 2006. Director's brief[4] was received August 7, 2006, and Employer's brief[5] was received on September 8, 2006.

B. Factual Background

1) Stipulations of the Parties

The parties stipulated to the following issues during the formal hearing held before me:

1. The individual who filed the claim is a "miner" (Tr. at 6);

2. The Miner worked as a miner after December 31, 1969 (Tr. at 6); and

3. Employer stipulated to eleven (11) years of coal mine employment (Tr. at 6).

2) The Miner's Testimony Before ALJ Kane [DX-48]

The Miner testified at the formal hearing of October 8, 2003 held before ALJ Kane. DX-48. He was born on September 26, 1948 and had a ninth grade education. DX-48-49. He was not married. Id. The Miner worked for Employer for about three years. DX-48-50. He ran a

[3] Denoted as "CB at -."
[4] Denoted as "DB at -."
[5] Denoted as "EB at -."

rock loader, loading coal and rock. Id. The Miner believes that he worked about thirty to thirty-five years around coal mines. DX-48-51. All of the Miner's coal mine work had been above ground. Id.

The Miner testified that he suffered from lung cancer. DX-48-59. However, he suffered from breathing problems before his diagnosis of cancer. DX-48-60. His breathing problems did not allow him to cut his grass. DX-48-63. His treating physician was Dr. Chaney whom he treated with once a month. DX-48-61. Dr. Chaney prescribed him Albuterol and Advair. DX-48-61; 62.

3) Testimony of the Miner's Brother [Tr. at 19-23]

The Miner's brother ["Brother"] testified at the formal hearing held before me. Brother testified that he and the Miner worked together. Tr. at 19-20. They worked in very dusty environments. Tr. at 21. Brother had witnessed the Miner's breathing problems, and observed instances when the Miner would "cough up old rock dust and old cold dust." Tr. at 20.

On cross-examination, Brother testified that he worked with the Miner at Locust Grove for about four or five months. Tr. at 22.

C. Timeliness of the Claim

This claim was filed on March, 26, 2001. Employer has continuously raised the issue of whether the claim was timely filed.[6] Pursuant to the Act and regulations, a claim for benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis is communicated to the Miner. See 20 C.F.R. §725.308. The regulations provide that "there shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c); Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602, 606 (6th Cir. 2001) ("Claims for black lung benefits are presumptively timely"). The party opposing entitlement must demonstrate that the claim is untimely and there are no "extraordinary circumstances" under which the limitation for filing should be tolled. Daugherty v. Johns Creek Elkhorn Coal Corp., 18 B.L.R. 1-95 (1994).

Employer has submitted no evidence that establishes that a medical determination of total disability due to pneumoconiosis was communicated to the Miner prior to March 26, 1998. Accordingly, I find that the presumption that the claim was timely filed has not been rebutted, and I further find that the claim was timely filed.

D. Responsible Operator

Employer contests its designation as the responsible operator. See DX-49-2; EB at 14-18. It argues that Locust Grove, Inc., is the last coal mine employer for whom the Miner worked one cumulative year. EB at 17. The District Director in this case named Employer as the responsible operator, and pursuant to §725.465(b), "the administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon

[6] Although Employer failed to brief this issue, it did not formally stipulate to timeliness.

the motion or written agreement of the Director." The Director has filed no such motion or written agreement, and further has argued that even if it was shown that the Miner last worked in coal mining at Locust Grove for a cumulative period of one year, Employer has failed to produce evidence that Locust Grove possesses sufficient assets to secure payment of benefits, if awarded. DB at 4. The Director cites to the following regulation to support its position:

> The designated responsible operator shall bear the burden of proving:
> (2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of §725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure payment of benefits in accordance with §725.606.

20 C.F.R. §725.495(c)(2) (emphasis added).

My review of the record reveals that Employer has failed to satisfy its burden under said provision. Employer has submitted no evidence to demonstrate that Locust Grove possesses sufficient assets to secure payment of benefits if they are awarded. Rather, Employer complains that it has attempted to contact Locust Grove but has been unable to contact any company personnel. EB at 17. Employer has conceded that it did not request a subpoena. Tr. at 10. Employer has had years to develop the evidence on this issue, but none has been forthcoming. I am not persuaded by Employer's argument that it has "all the proof that [they] could get." Tr. at 10. I find that Employer has failed to establish that Locust Grove, Inc., is a potentially liable operator in this case. Accordingly, I find that Diamond May Mining Company is the properly named responsible operator.

E. Length of Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. See Shelesky v. Director, OWCP, 7 B.L.R. 1-34, 1-36 (1984); Rennie v. U.S. Steel Corp., 1 B.L.R. 1-859, 1-862 (1978). The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. See Croucher v. Director, OWCP, 20 B.L.R. 1-67, 1-72 (1996) (en banc); Dawson v. Old Ben Coal Co., 11 B.L.R. 1-58, 1-60 (1988). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. Calfee v. Director, OWCP, 8 B.L.R. 1-7, 1-9 (1985).

In this claim, the Director found that the Miner had established eighteen (18) years of coal mine employment. DX-39-3. Although Employer had stipulated to eighteen years before

OALJ Kane (DX-48-47), it was not willing to stipulate to more than eleven (11) years before me. Tr. at 6. After a review of the record, specifically the Miner's social security records and his testimony before ALJ Kane, I find that the record better supports Employer's original stipulation of eighteen years of coal mine employment. Therefore, I find that the Miner worked in coal mine employment for at least eighteen years.

F. Entitlement

Benefits are provided under the Black Lung Act for miners who are totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201(a). Because this claim was filed subsequent to January 19, 2001, Claimant's entitlement to benefits will be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner had pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner was totally disabled, and (4) the miner's pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d)(2)(i)-(iv); See Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994); Perry v. Director, OWCP, 9 B.L.R. 1-1, 1-2 (BRB 1986).

1) Whether the Miner Had Pneumoconiosis

A finding of the existence of pneumoconiosis is determined pursuant to 20 C.F.R. §718.202. In addition, the regulations permit an ALJ to give appropriate consideration to "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis." 20 C.F.R. §718.107(a). Finally, the Benefits Review Board ("the Board") has held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. Mabe v. Bishop Coal Co., 9 B.L.R. 1-67 (1986) (the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the X-ray evidence of record was positive).

20 C.F.R. §718.202(a) Evidence

There are four means of establishing the existence of pneumoconiosis set forth at 20 C.F.R. §§718.202(a)(1) through (a)(4):

(1) X-ray evidence: §718.202(a)(1).

(2) Biopsy or autopsy evidence: §718.202(a)(2).

(3) Regulatory presumptions: §718.202(a)(3):

(a) §718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

(b) §718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

(c) §718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

and

(4) Physician's opinions based upon objective medical evidence: §718.202(a)(4).

The following is a discussion of the §718.202(a) evidence of record:

1. Chest X-Ray Evidence - §718.202(a)(1).

Under §718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with §718.102.[7] An ALJ may utilize any reasonable method of weighing the X-ray evidence. Sexton v. Director, OWCP, 752 F.2d 213 (6th Cir. 1985). Generally, a physician's qualifications at the time he/she renders an interpretation should be considered. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32 (1985). It is well established that it is proper to credit the interpretation of a dually qualified (B-Reader and BCR) physician over the interpretation of a physician who is solely a B-Reader. Zeigler Coal Co. v. Director, OWCP [Hawker], 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); Cranor v. Peabody Coal Co., 22 B.L.R. 1-1 (1999) (en banc on recon.); Sheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). The Board has also held that greater weight may be accorded the X-ray interpretation of a dually qualified physician over that of a physician who is only a BCR. Herald v. Director, OWCP, BRB No. 94-2354 BLA (Mar. 23, 1995) (unpublished). In addition, an ALJ is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The current record contains the following admissible chest X-ray evidence:

[7] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. §37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §727.206(b)(2)(iii) (2001).

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials	Film Quality	Interpretation
(1)						
11/20/01	11/20/01	DX-11	Wicker	None noted	1	No evidence of pneumo.
11/20/01	12/17/01	DX-12	Sargent	B-Reader; BCR	1	Quality only
11/20/01	05/20/02	DX-13	Poulos	B-Reader; BCR	1	No evidence of pneumo.
(2)						
03/07/02	03/07/02	DX-15	Halbert	B-Reader; BCR	1	No evidence of pneumo.
03/07/02	03/07/02	DX-48	Rosenberg	B-Reader	1	Negative

As the preceding table demonstrates, four readings of two X-rays are relevant to this case. None of the physicians rendering X-ray interpretations found evidence of pneumoconiosis. Accordingly, I find that Claimant has failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

2. Biopsy or autopsy evidence - §718.202(a)(2).

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. 20 C.F.R. §718.202(a)(2). Although the Miner passed away during the adjudication of the claim, Claimant has apparently declined to retrieve and submit autopsy evidence. Thus, this method is unavailable here because the current record contains no such evidence.

3. Regulatory presumptions - §718.202(a)(3).

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions are applicable, the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. §718.202(a)(3).

4. Physicians' opinions - §718.202(a)(4).

The fourth way to establish the existence of pneumoconiosis under §718.202(a) is set forth as follows in subparagraph (4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical

performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." A "reasoned opinion" is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based his diagnosis. Fuller v. Gibralter Coal Co., 6 B.L.R. 1-1291 (1984). An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989).

The record contains the following physicians' opinion evidence:

Dr. Mitchell Wicker, J.R., M.D. [DX-11]

Dr. Wicker performed a full OWCP pulmonary evaluation of the Miner on November 20, 2001. DX-11. He attached a Form CM-911a to his report and noted a smoking history of a pack of cigarettes per day from age eighteen through the year 1995. Dr. Wicker reported the following clinical findings: no evidence of pneumoconiosis on X-ray; total disability based upon pulmonary function testing. On his X-ray report, Dr. Wicker reported: "No acute pulmonary disease is noted. Bony structures intact. Increased markings at both bases consistent with chronic bronchitis." He opined that based upon his examination, the Miner did not have an occupational lung disease which was caused by coal mine employment. Rather, Dr. Wicker diagnosed the Miner as totally disabled due to cigarette smoking. He opined that the Miner does not retain the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment.

Medical Records from Dr. George Chaney, M.D. [DX-48]

Dr. Chaney's professional credentials are not of record. His reports reveal that he was treating the Miner for lung cancer. DX-48-219. He reported that pulmonary function testing revealed a restrictive and obstructive defect. DX-48-220. He also reported that a CT scan of the chest revealed fibrosis. DX-48-228.

Dr. Lawrence Repsher, M.D. [DX-48]

Dr. Repsher is a Board-certified pulmonary specialist and a certified B-Reader. DX-48-120. He prepared a consultative report dated August 12, 2003 (DX-48-131) and was deposed in this matter on September 19, 2003. DX-48-106. Dr. Repsher noted a coal mine employment history of twenty years and a two pack per day smoking history from age eighteen to age fifty-three. He opined that his review of the Miner's medical records revealed no evidence of coal workers' pneumoconiosis. He opined that the Miner suffered from bronchogenic cancer which is not related to work in the coal mines but was likely attributable to his history of cigarette smoking. Dr. Repsher also found evidence of mild COPD [chronic obstructive pulmonary

disease] which he unequivocally stated was not related to the Miner's coal mine employment but rather to his smoking habit.

Dr. David Rosenberg, M.D. [DX-14; EX-1; EX-2]

Dr. Rosenberg is a Board-certified pulmonary and occupational specialist and a certified B-Reader. EX-2. He conducted a pulmonary evaluation of the Miner on March 7, 2002. He prepared a report dated April 3, 2002 (DX-14), was deposed on April 27, 2006 (EX-2), and prepared a supplemental report dated April 18, 2006. EX-1. Dr. Rosenberg noted a thirty three year coal mine employment history and a smoking history of a pack per day beginning at age twenty five through the year 1996. He reported the following clinical findings: no rales, rhonchi, or wheezes on physical examination; normal sinus rhythm on EKG; chest X-ray revealed chronic pleural parenchymal changes with old rib fractures; blood gas study revealed preserved oxygenation with an elevated carboxyhemoglobin level; and pulmonary function testing revealed a normal total lung capacity with a mildly reduced diffusing capacity. Dr. Rosenberg reported that the Miner did not have the interstitial form of coal worker's pneumoconiosis but did suffer from a moderate level of COPD. He attributed the Miner's COPD to his history of smoking. Dr. Rosenberg concluded his report by opining that the Miner had the capacity to perform his previous coal mining job or similarly arduous types of employment.

In his supplemental report, Dr. Rosenberg noted that he reviewed a number of the Miner's medical records including the death certificate, Dr. Wicker's evaluation, and the records of Dr. Chaney. Dr. Rosenberg opined that "clearly, based on his pulmonary functional status, prior to his death, [the Miner] was disabled from performing his previous coal mining job." EX-1. Dr. Rosenberg opined that the Miner did not have legal coal workers' pneumoconiosis and his lung cancer was not related to his past coal mine employment as coal dust is not considered a carcinogen.

20 C.F.R. §718.107(a): "Other Medical Evidence"

20 C.F.R. §718.107(a) allows an ALJ to give appropriate consideration to the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis. The party submitting the test or procedure bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits. 20 C.F.R. §718.107(b).

The record includes a report signed by Dr. Mahender Pampati of a CT Scan performed of the Miner's chest. DX-48-243. Dr. Pampati noted evidence of scarring and fibrosis in the apices with questionable poorly calcified density in the right apex. He also noted evidence of emphysematous bullae and pleural calcification and the possibility of a small pneumothorax. He opined that he had a strong suspicion of carcinoma of the lungs.

The record also includes the Miner's death certificate. DX-48-3. "Lung cancer" is listed as the immediate cause of the Miner's death.

Weighing the Medical Evidence

The record in this case is void of a single X-ray that was interpreted as positive for the presence of pneumoconiosis. Although Claimant asserts that Dr. Wicker "is Board Certified in internal medicine with a subspecialty in pulmonary disease" (CB at 3), his professional credentials are not of record.[8] Regardless, I find that his report does not establish the presence of pneumoconiosis. Claimant asserts that Dr. Wicker diagnosed the Miner with a respiratory impairment. Claimant then cites to legal precedents, none of which provide a basis for Claimant's conclusion at the end of the second paragraph: "As such, the opinion of Dr. Wicker is sufficient to establish that the [Miner] suffer[ed] from pneumoconiosis." CB at 4. Although Dr. Wicker certainly diagnosed the Miner with a totally disabling respiratory impairment, he listed "cigarette abuse" as the sole etiology of that impairment. DX-11-9. Further, Dr. Wicker checked-off the "NO" box under the question, "does the miner have an occupational lung disease which was caused by his coal mine employment?" DX-11-9. I therefore find that Dr. Wicker's report does not establish a diagnosis of legal pneumoconiosis as he did not relate the diagnosed respiratory impairment to the Miner's past coal mine employment. See 20 C.F.R. §718.201(a)(2) ("Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae *arising out of coal mine employment*") (emphasis added). Dr. Wicker's report also precludes a finding of clinical pneumoconiosis as he expressly asserted that he found "no evidence of pneumoconiosis" on the X-ray he performed.

Based upon the Miner's testimony before ALJ Kane (DX-48-61), I find that Dr. Chaney is the Miner's treating physician and his opinion merits special consideration[9] pursuant to 20 C.F.R. §718.104(d). Claimant asserts that Dr. Chaney diagnosed the Miner with COPD and bronchitis. My review of his records reveals that he did indeed diagnose COPD and bronchitis. Furthermore, I note that both chronic bronchitis and COPD fall within the definition of pneumoconiosis, but only if they are related to the Miner's coal mine employment. See 20 C.F.R. §718.201(a)(2); Hughes v. Clinchfield Coal Co., 21 B.L.R. 1-134, 1-139 (1999) (The Board held that both chronic bronchitis and emphysema can fall within the definition of pneumoconiosis). Dr. Chaney's report fails to sufficiently relate his diagnoses to the Miner's coal mine employment. Consistent with Dr. Chaney's diagnoses, Drs. Rosenberg and Repsher, both of whom are pulmonary specialists, also diagnosed the Miner with COPD. However, they both unequivocally opined that it was not related in any way to the Miner's past employment but rather to his lengthy and extensive smoking history. Their reports are both well-documented and well-reasoned and are supported by the totality of the medical evidence.

I also find that Claimant has not established the presence of pneumoconiosis with the CT Scan report of Dr. Pampati. Dr. Pampati's professional credentials are not of record and his report is not adequately explained. Although Dr. Pampati found evidence of fibrosis on the lungs, he seems to attribute that finding to emphysema and his strong suspicion of lung cancer. That would be consistent with the other medical reports of record. Moreover, Dr. Rosenberg discussed at his deposition that the CT Scan confirmed the negative X-ray readings in that it did not disclose the presence of micronodularity. EX-2 at 25.

[8] A C.V. of Dr. Maan Younes appears at DX-11-11.
[9] Because Dr. Chaney's credentials are not of record, I find it inappropriate to give his opinion controlling weight.

Because I find no evidence of record that purports to establish either clinical or legal pneumoconiosis, I find that Claimant has failed to establish that the Miner suffered from pneumoconiosis.

2) Whether Pneumoconiosis Arose Out of Coal Mine Employment

In the present case, because I have found eighteen (18) years of coal mine employment, if Claimant had established that the Miner had pneumoconiosis, a rebuttable presumption would have arisen that the pneumoconiosis was caused by coal mine employment. 20 C.F.R. §718.203(b). Because Claimant has not successfully established the threshold matter of whether the Miner had pneumoconiosis, by implication the issue of causation is resolved. The presumption, therefore, is not triggered and analysis under this prong is unnecessary.

3) Whether the Miner Was Totally Disabled

In addition to establishing the presence of coal workers' pneumoconiosis, in order for Claimant to prevail under the Act, he must establish that the Miner was totally disabled due to a respiratory or pulmonary condition prior to his death. 20 C.F.R. §718.204(a). A miner is considered totally disabled within the Act if "the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time."

20 C.F.R. §718.204(b)(1). The regulations at 20 C.F.R. §718.204(b) provide the following five methods to establish total disability: (a) pulmonary function studies; (b) arterial blood gas studies; (c) evidence of cor pulmonale with right-sided congestive heart failure; (d) reasoned medical opinions; and (e) lay testimony. 20 C.F.R. §§718.204(b)(2) and (d). However, in a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony. 20 C.F.R. §718.204(d)(5); Tedesco v. Director, OWCP, 18 B.L.R. 1-103 (1994). Further, a presumption of total disability is not established by a showing of evidence qualifying under a subsection of §718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

a) Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, after accounting for sex, age, and height, produce a qualifying value for the FEV1 test, and produce either a qualifying value for the FVC

test or the MVV test, or produce a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718, 20 C.F.R. §718.204(b)(2)(i).

The following pulmonary function studies ("PFSs") are contained in the record:

Date	EX. No.	Physician	Age/ Ht.	FEV_1	FVC	MVV	FEV_1/FVC	Effort	Qualifies
11/20/01	DX-11	Wicker	53 73"	2.05 2.32*	3.72 4.05*	84.7 71.4*	55.1% 57.2%	Good	**YES** **YES*** FEV_1: 2.42 FVC: 3.06 MVV: 96
03/07/02	DX-14	Rosenberg	53 72"	1.96 2.32*	3.30 3.75*	66 82*	59% 62%*	Good	**YES** **YES*** FEV_1: 2.33 FVC: 2.94 MVV: 93
01/15/03	DX-48	Chaney	54 72"	1.91 1.93*	3.45 3.56*	66.5 51.0	55.3% 54.3%*	N/a	**YES** **YES*** FEV_1: 2.31 FVC: 2.92 MVV: 93

* Post-bronchodilator values

As the preceding table demonstrates, all of the PFSs of record resulted in qualifying values under the regulations. All of the qualifying results are based upon the reported FEV_1 and MVV values. It should be noted that Dr. Maan Younes invalidated the November 20, 2001 PFS administered by Dr. Wicker because no time-volume tracings were included. DX-11-10. Dr. Matthew Vuskovich also invalidated the study for the same reason. DX-48-151. However, the validity of the other two qualifying PFSs has not been contested. I find that the pulmonary function study evidence of record demonstrates total disability under the Act.

b) Arterial Blood Gas Studies

To establish total disability based on Arterial Blood Gas Studies, the test must produce the totals presented in the Appendix C to 20 C.F.R. Part 718, 20 C.F.R. §718.204(b)(2)(ii).

The record contains the following arterial blood gas study ("ABGs") evidence summarized below:

Date	EX. No.	Physician	Altitude	pCO_2	pO_2	Qualifies[10]
11/20/01	DX-11	Wicker	0-2999 ft.	34.2 31.7*	78.9 104.2*	**NO** (66) **NO***

[10] In order to qualify for total disability under arterial blood gas studies, Claimant's pCO_2 value would have to be equal to or lower than the given pO_2 levels found in the "Qualifies" column of this chart.

						(68)*
03/07/02	DX-14	Rosenberg	0-2999 ft.	38.2	84.4	**NO** (62)

* Values obtained during exercise

As the preceding table demonstrates, neither of the ABGs of record produced qualifying values under the regulations. I find that the preponderance of the ABG evidence does not support a finding of total disability.

c) Cor Pulmonale Diagnosis

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. §718.204(b)(2)(iii).

There is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Accordingly, I find that Claimant has not demonstrated total disability pursuant to §718.204(b)(2)(iii).

d) Reasoned Medical Opinion

The fourth method for determining total disability is through the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful employment. Such an opinion must be based on acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989).

To reiterate, both Dr. Wicker (DX-11) and Dr. Rosenberg (EX-1 at 3) opined that the Miner did not retain the capacity to perform his previous coal mine employment. Dr. Repsher opined that the Miner retained the respiratory ability to perform the work of an above ground coal miner or comparable work in another industry.

e) Lay Testimony

The Miner testified that he suffered from breathing problems that prevented him from performing such activities as mowing his lawn. I can infer that he believed that he was unable to return to his previous coal mine employment.

I find that the Miner was totally disabled prior to his death. The pulmonary function tests of record produced qualifying values under the federal regulations. In addition, both Dr. Wicker and Dr. Rosenberg opined that the Miner was unable to perform his previous coal mine employment. The only physician that contradicts that opinion is Dr. Repsher. However, Dr.

Repsher is also the only physician who did not personally perform a pulmonary evaluation of the Miner. Dr. Rosenberg's well-documented and well-reasoned opinion merits substantial weight on this issue. In consideration of the totality of the evidence, I find that the Miner was totally disabled under the Act.

4) Whether Total Disability Was Due to Pneumoconiosis

The amended regulations at Part 725 mandate that a miner is eligible for benefits if his "pneumoconiosis contributes to [his] total disability." 20 C.F.R. §725.202(d)(2)(iv). A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c). Because Claimant has not successfully established the threshold element of presence of pneumoconiosis, analysis under this prong is unnecessary.

III. CONCLUSION

Based upon the foregoing, I find that Claimant has failed to establish that the Miner was totally disabled due to pneumoconiosis. Accordingly, his claim for an award of benefits must be denied.

IV. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim.

ORDER

Claimant's claim for benefits under the Act is hereby DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence

establishing the mailing date, may be used. *See* 20 C.F.R. §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. §725.481.